

MOTION FILED
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No. 83-1130

In The
Supreme Court of the United States
October Term, 1983

GERALD D. BAIR, DIRECTOR OF REVENUE OF
THE IOWA DEPARTMENT OF REVENUE; IOWA
DEPARTMENT OF REVENUE; IOWA RAILWAY
FINANCE AUTHORITY; MAURICE E. BARINGER,
TREASURER OF IOWA AND CUSTODIAN OF THE
SPECIAL RAILROAD FACILITY FUND; RAYMOND
L. KASSEL, DIRECTOR OF TRANSPORTATION OF
THE STATE DEPARTMENT OF TRANSPORTATION;
STATE TRANSPORTATION COMMISSION OF THE
STATE DEPARTMENT OF TRANSPORTATION; and
STATE DEPARTMENT OF TRANSPORTATION,
Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY; BURLINGTON NORTHERN RAIL-
ROAD COMPANY; CHICAGO AND NORTH WEST-
ERN TRANSPORTATION COMPANY; ILLINOIS
CENTRAL GULF RAILROAD COMPANY; NORFOLK
AND WESTERN RAILWAY COMPANY; RICHARD
B. OGILVIE, TRUSTEE OF THE PROPERTY OF
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, DEBTOR; AND UNION PA-
CIFIC RAILROAD COMPANY,

Respondents,

IOWA RAIL SHIPPERS ASSOCIATION,
Intervenors-Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Iowa

**MOTION OF AMICUS TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF AMICUS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

THOMAS D. HANSON
BLANCHARD, CLESS, HANSON & PUNDT
1300 Des Moines Building
Des Moines, Iowa 50309
Telephone: (515) 244-0177
Counsel of Record for
Amicus Iowa Farm Bureau Federation

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AMICUS CURIAE IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

The Amicus identified below respectfully moves for
leave to file the attached brief Amicus Curiae in support

of the Petition. The consent of the attorney for the Petitioners has been obtained. The consent of the attorney for the Respondents was requested but refused.

The identity of the movant and a brief statement about it follows:

The Iowa Farm Bureau Federation is a corporation not for pecuniary profit, incorporated under Chapter 504 of the Code of Iowa. Its membership consists of 149,000 member families and constitutes the largest voluntary, nongovernmental organization dealing with the concerns of farmers and agriculture in the State of Iowa. Adequate transportation for rural Iowa has long been one of the goals of the Iowa Farm Bureau Federation.

Respectfully submitted,

By: _____

THOMAS D. HANSON
BLANCHARD, CLESS, HANSON
& PUNDT

1300 Des Moines Building
Des Moines, Iowa 50309
Telephone: (515) 244-0177

*Counsel of Record for
Amicus Iowa Farm Bureau
Federation*

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Intervenors-Respondents.

**BRIEF AMICUS CURIAE IN
SUPPORT OF PETITION FOR WRIT
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ARGUMENT

The position of the Amicus is that the anti-discrimination tax provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. 94-210, 90 Stat. 54, codified as 49 U.S.C. § 11503, do not implicate state excise taxes, but even if such implication can somehow be found under this statute, the Iowa Supreme Court erroneously determined that the rail carriers suffered tax discrimination.

"Commercial and industrial property" is the only class listed in 49 U.S.C. § 11503 with which a tax on a rail carrier is to be compared to determine whether the state tax law discriminates against a rail carrier. Therefore, in order to determine whether the requisite tax discrimination exists, it is necessary to examine the impact of the tax upon rail carriers as compared to the tax impact, if any, upon "commercial and industrial property." Such an analysis can only be made under § 11503 through a comparison of state property taxes. Where a state excise tax, such as the Iowa Code chapter 324A (1983) fuel tax, is involved, § 11503 does not list or indicate how to determine a comparable class for discrimination purposes. Thus, any attempt to compare state excise taxes upon rail carriers with state excise taxes imposed (or not imposed) upon other taxpayers is simply unauthorized by § 11503. The Iowa Supreme Court erred in making such a comparison, and this Court should note probable jurisdiction to review this error.

Even if § 11503 implicates state excise taxes, the Iowa Supreme Court erred in comparing rail carriers with dissimilar transportation modes (barges and aircraft). As the dissenting Iowa Supreme Court Justices pointed out:

Furthermore, in attempting to identify similarly situated businesses, it is logical to look at transportation modes because they are most likely to have similar characteristics. In doing so, however, differences in the nexus between the state and particular business must be taken into account. This is a factor the court's opinion wholly omits from consideration. Discrimination cannot be shown unless the privilege tax burden on businesses similarly situated is unequal when allowances are made for differences in the activities of the businesses within the state.

338 N.W.2d at 350. Under the dissent's analysis, the only transportation mode similarly situated to rail carriers is trucks which paid a greater tax (15½ cents) than rail carriers (8 cents) for each gallon of fuel consumed in Iowa. 338 N.W.2d at 346. Despite the lesser tax imposed on rail carriers, the majority of the Iowa Supreme Court determined that the tax imposed on rail carriers was discriminatory.

The Iowa Supreme Court also stated that if *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929) was still controlling, Iowa's constitutional inability to tax barge fuel, while taxing rail carrier fuel, would constitute discrimination under 49 U.S.C. § 11503. 338 N.W.2d at 348. This conclusion is flawed because "Impotence of state power" to impose a tax upon one subject does not show discrimination against another subject which the State can tax. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 364 (1941). The Congressional intent for § 11503 was to prohibit tax discrimination which states would otherwise have the constitutional power to enact, and not to

create statutory prohibitions against tax schemes which the states would have no constitutional power to enact.

Respectfully submitted,

THOMAS D. HANSON
BLANCHARD, CLESS, HANSON
& PUNDT

1300 Des Moines Building
Des Moines, Iowa 50309
Telephone: (515) 244-0177

*Counsel of Record for
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